APPEAL NO. 990401

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 27, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease, specifically carpal tunnel syndrome (CTS), on Injury 2, and whether the claimant sustained disability from such injury. The hearing officer found that the claimant did not sustain a compensable injury on Injury 2, but her problems were a continuation of her injury 1 injury and that since there was no compensable injury, there was no disability. The claimant appeals, arguing that there is no indication in the decision and order that the hearing officer properly analyzed the case. The claimant argues that the hearing officer should first determine whether the claimant had proven producing cause and then determine whether the respondent (carrier) proved sole cause. The claimant argues that failing to analyze the case in this way abandons the doctrine that the employer takes the employee as she is and would make the predisposition to a disease a defense to liability. The claimant argues that this is contrary to the doctrine, recently reiterated by the courts, that workers' compensation legislation should be liberally construed to provide compensation to injured workers. The carrier replies that the hearing officer's decision was sufficiently supported by the evidence.

DECISION

Reversed and remanded.

The claimant testified that she began working for the employer in 1985 assembling picture frames, a job which required the repetitive use of her hands. It was undisputed that the claimant sustained an injury to her left wrist and had CTS surgery in 1996. The claimant testified that she returned to work for the employer in 1997. The claimant testified that she initially had some soreness in her left hand after returning to work, but that this gradually went away. The claimant testified that when she returned to work after the Christmas holidays in January 1998 there was a lot of work and she was required to work very fast. The claimant testified that she started to have problems with her left hand and returned to Dr. W, the surgeon who had performed the 1996 CTS surgery. Dr. W eventually diagnosed the claimant with recurrent CTS and the claimant took the position that as a result of this condition she has had disability since Injury 2.

Dr. W testified by phone at the CCH. Dr. W testified that a person can be cured of CTS but that it can reoccur. Dr. W testified that in his opinion this is what had happened in the claimant's case. Dr. W also explained the use of the injury 1 injury date in his initial medical reports in 1998. It was Dr W's opinion that the claimant had suffered a new injury as a result of the repetitive use of her hands after returning to work.

The carrier argued that the claimant did not sustain a new injury but was suffering from a continuation of her prior injury. The claimant put into evidence a statement from a person in the claimant's personnel department who stated that the claimant complained of

problems with the hands after returning to work in 1997. The carrier also submitted a medical report from Dr. D, who it represented examined the claimant by agreement of the parties. Dr. D stated in a report dated August 10, 1998, as follows:

> I do feel that the problem is related to her original problem in December of injury 1 and therefore she is going to have to come to terms with the fact there are some types of work activity that she is not able to tolerate.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. The claimant did not sustain an injury in the form of an occupational disease ([CTS]) while working for Employer on injury 2; rather her problems are a continuation of her injury 1 injury.

3. The inability of the Claimant to obtain and retain employment at wages equivalent to Claimant's wages prior to injury 2, at any time since injury 2, is because of something other than a injury 2 injury Claimant sustained while working for Employer.

CONCLUSIONS OF LAW

3. The Claimant did not sustain a compensable injury in the form of an occupational disease ([CTS]) on injury 2.

4. Since there is no compensable injury, there can be no resultant disability.

Section 401.011(26) defines injury as follows:
"Injury" means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease.

Section 401.011(34) defines occupational disease as follows:

> "Occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

Whether or not an injury has occurred is a question of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. Section

410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

However, we have an obligation to review the legal bases of decisions of hearing officers and an obligation to make certain that proper legal standards are applied in resolving cases under the 1989 Act. The issue of injury can certainly become more complex when there is more than one injury involved and a number of legal doctrines bear on the question of injury under such circumstances. The beginning point is that the employer takes the employee as the employer finds him or her. A corollary to this doctrine is the well-settled proposition that the existence of a preexisting injury or condition is only a defense to liability for an injury if the preexisting condition or injury is proven to be the sole cause of a claimant's condition. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 93226, decided May 13, 1993; Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993. The burden or proving sole cause is on the carrier. Appeal No. 93226, *supra.*

To establish a compensable injury the claimant must prove that the injury is a producing cause of the claimant's condition. Texas Workers' Compensation Commission Appeal No. 981382, decided August 10, 1998. In Appeal No. 981382 we cited the following definition of producing cause from 2 STATE BAR OF TEXAS, PATTERN JURY CHARGES, PJC 25.03 (1989) as being instructive:

> "**Producing cause**" means an injury or condition which, either independently or together with one or more other injuries or conditions, results in any incapacity or any loss of use of a particular member of the body, and without this injury or condition, the incapacity or loss of use would not occurred when it did.

By definition there may be more than one producing cause of an event. In any case, this is well settled in regard to the Texas workers' compensation law. Texas Workers' Compensation Commission Appeal No. 951608, decided November 10, 1995. It is equally well settled that there can only one sole cause. Appeal No. 951608. This also follows from the very nature of the concept of sole cause which by definition means the only cause.

We also note that in the present case the claimant is contending that her Injury 2, injury is an aggravation of her preexisting condition. Under the above-cited definition of producing cause, an aggravation of a preexisting injury or condition may be a compensable injury. This is also a well established doctrine which we have explicitly held applies to the 1989 Act. Texas Workers' Compensation Commission Appeal No. 960622, decided May 13, 1996.

It is unclear whether the hearing officer properly applied these doctrines to the facts of the present case. In this regard, we have problems similar to those we had in Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994, and Texas Workers' Compensation Commission Appeal No. 952061, decided January 22, 1996, which led us in both those cases to reverse the decision of the hearing officer and remand for more explicit findings regarding these doctrines. We also do so in the present case to ensure that proper legal standards are used in resolving the issues presented by this case. The author judge agrees with Judge Kelley's insightful concurring opinion that the essential error by the hearing officer was in failing to analyze the evidence in terms of whether or not the claimant suffered a new injury due to aggravation.

We do not reverse the hearing officer's decision strictly based upon the doctrine that the workers' compensation law should be liberally construed to provide benefits to injured workers. We do note that this doctrine actually underlies the development of many of the doctrines discussed above. We also note that the Texas appellate courts, including recently the Texas Supreme Court, have applied the doctrine of liberal interpretation to the 1989 Act. *See* Albertson's, Inc. v. Sinclair, 42 Tex. Sup. Ct. J. 358 (Feb. 4, 1999); City of Del Rio v. Contreras, 900 S.W.2d 809 (Tex. App.--San Antonio 1995, writ denied).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

I concur in the decision to remand this case to the hearing officer. The claimant had the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers' Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In Martinez v. Travelers Insurance Company, 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ), the court stated that in a workers' compensation case, as in any other case, the plaintiff has the burden of proving elements of her asserted claim by a preponderance of the evidence. Under the 1989 Act, an injury includes an occupational disease and an occupational disease includes a repetitive trauma injury. Sections 401.011(26) and 401.011(34). In Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, the Appeals Panel stated that an aggravation of a preexisting condition is an injury in its own right, *citing* INA of Texas v. Howeth, 755 S.W.2nd 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ), and that a carrier that

wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving that, *citing* Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977).

The Appeals Panel also stated in Appeal No. 94428 that merely asserting aggravation does not carry the burden that the proponent has to prove that an injury occurred and that what must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury. Appeal No. 94428 noted that whether there has been an aggravation is generally a question for the trier of fact to determine. The hearing officer in the instant case noted that an aggravation injury was alleged, and there certainly is some evidence to support that allegation; however, she made no findings of fact as to whether claimant sustained a compensable injury due to a work-related aggravation of a preexisting condition as a result of repetitious, physically traumatic activities that occurred over time and arose out of an in the course and scope of employment, and thus I would remand for findings of fact on that matter.

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Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in remanding, although I don't think "sole cause" had a thing to do with this case because I believe that to be a concept related to "incapacity," most comparable to ability to work in the 1989 Act, rather than whether an injury occurred. Rather, the error committed by the hearing officer is that the facts of this case cry out for some analysis of whether there was an aggravation-a worsening, acceleration, or exacerbation-of carpal tunnel syndrome (CTS). It seems to me that the hearing officer's finding that there was a "continuation" concedes the existence of CTS after the claimant's contended flurry of activity in Christmas season 1997. Frankly, where there has been surgery, apparent recovery, a certification of maximum medical improvement and an impairment rating, and then a fresh diagnosis of CTS after a concentrated exposure to the hazards of the disease, I am hard pressed to affirm a finding denying compensability because the worker had a similar condition before, on the theory that this is merely a "continuation" of the previous disease. The opinion of the carrier doctor that there is no "new" injury is clearly an analysis of there being no additional condition than CTS. This is not necessarily at odds with a subsequent aggravation having occurred.

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Susan M. Kelley
Appeals Judge